

*United States Court of Appeals
for the Second Circuit*



**PETITIONER'S
BRIEF**

9

75-4263

United States Court of Appeals
FOR THE SECOND CIRCUIT

NIAGARA MOHAWK POWER CORPORATION,

Petitioner,

—v.—

FEDERAL POWER COMMISSION,

Respondent,

TOWN OF MASSENA, NEW YORK,

Intervenor.

B

P/S

BRIEF OF PETITIONER
NIAGARA MOHAWK POWER CORPORATION

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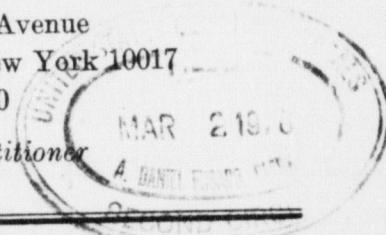




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BRIEF OF PETITIONER

NIAGARA MOHAWK POWER CORPORATION

Preliminary Statement

By order issued July 23, 1975 (66a),* respondent Federal Power Commission ("FPC"), at the request of intervenor Town of Massena, New York ("Massena"), instituted an investigation under Section 206 of the Federal Power Act ("Act"), 16 U.S.C. §824e, into allegations by Massena against petitioner Niagara Mohawk Power Corporation ("Niagara"). Niagara then moved before the FPC to dismiss said investigation. The FPC, in orders issued Sep-

* Citations followed by the suffix "a" refer to pages in the Joint Appendix herein.

tember 25, 1975 (84a) and November 13, 1975 (105a) ("the subject orders"), denied Niagara's motion and Niagara's application for rehearing.

On December 2, 1975, Niagara filed the present Petition for Review (133a) of the subject orders in this Court.

The subject orders have been published, respectively, at 40 Fed.Reg. 45478 (October 2, 1975) and 40 Fed.Reg. 54297 (November 21, 1975).

Question Presented

Did the FPC err in issuing the subject orders and in determining that it had jurisdiction to conduct the investigation instituted by its order issued July 23, 1975?

Facts

A. The Proceeding Before the FPC

On April 14, 1975, pursuant to Section 205 of the "Act, 16 U.S.C. § 824d, Niagara submitted for filing as a rate schedule a transmission agreement dated March 7, 1975 (the "Con Ed-Niagara transmission agreement") between Niagara and Consolidated Edison Company of New York, Inc. ("Con Ed"). Said agreement provided that Niagara would transmit, or wheel, power over Niagara's system from its connection with the Rochester Gas and Electric Corporation to Con Ed's Pleasant Valley 345 Kv substation. Said transmission agreement and the services to be performed by Niagara thereunder were to terminate, and in fact *did terminate*, on October 31, 1975. Massena was not a party to the Con Ed-Niagara transmission agreement.

The proposed filing of the Con Ed-Niagara transmission agreement was noticed by the FPC on April 18, 1975 and was assigned FPC Docket No. E-9379 ("Docket E-9379").

On May 5, 1975, Massena filed a Protest and Petition to Intervene in Docket E-9379 ("Protest and Petition") (5a).

At the heart of its Protest and Petition, Massena made the three following allegations:

(1) that Niagara had "refused" * to "affirmatively commit itself" to transmit power from the Power Authority of

* In its Offer to Purchase Electric Properties of the Niagara Mohawk Power Company [sic.] by the Town of Massena, New York (Protest and Petition, Exhibit A) Massena offered (19a-20a) :

"To enter into an agreement with the Company for the delivery of power through the Company's Browning and Andrews substations and certain 115-Kv transmission lines and facilities for transforming and delivering power from the Power Authority of the State of New York to Massena on terms and conditions mutually agreeable to the parties; *provided* that Massena will be required to pay no more than reasonable charges for the service under generally recognized utility rate-making standards, and; *provided further* that any resulting contract between the parties will be for a time certain to accommodate the needs of Massena and the Company." [Emphasis in original.]

Subsequently, in the course of exchanging requests for information on a number of subjects, one of which was the possibility of Niagara's agreeing to wheel power for Massena (see Protest and Petition, Exhibits C-I at 29a-39a), Massena stated that Niagara's "response concerning transmission services is absolutely non-responsive and can only be construed as negative" (Protest and Petition, Exhibit E, at 33a, emphasis added). Subsequently, citing *Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973), Massena threatened to bring a treble damage lawsuit against Niagara under the anti-trust laws "in an appropriate Federal District Court" if Niagara "continues to refuse" to transmit power for the proposed Massena utility (Protest and Petition, Exhibit G, at 36a). At that point, Mr. Martin, Niagara's senior vice president and general counsel, replied: "I am not aware that Niagara Mohawk to date

the State of New York ("PASNY") to a proposed municipal electric system which Massena was seeking to establish (see Protest and Petition, at 10a-13a);

(2) that the filing of the Con Ed-Niagara transmission agreement "is an integral part of an interstate program and combination to unlawfully monopolize the electric utility industry" (Protest and Petition, 12a); and

(3) that the Con Ed-Niagara transmission agreement "if accepted and approved by the Commission, will financially strengthen Niagara . . ." and produce revenues which "will be unlawfully used by [Niagara] in an effort to resist the establishment of a municipality [sic.] electric system in Massena through advertising, legislative efforts in New York, and in its dealing with PASNY" (Protest and Petition, 13a, subparagraph (g), and 14a, subparagraph (k)).

As to Niagara's alleged "refusal" to wheel power for the proposed Massena municipal utility, Massena stated:

"Massena does not ask this Commission to order Niagara Mohawk to transmit PASNY power in recognition that this Commission has no authority to do so. Cf. Otter Tail Power Co. v. United States, supra. [410 U.S. 366 (1973)]. Massena does ask for a hearing on the anticompetitive allegations raised and a rejection of the filing, assuming Massena can establish, through probative evidence, its claims." (Protest and Petition, 14a-15a) (emphasis added.)

As to Massena's allegations that the Con Ed-Niagara transmission agreement was part of an unlawful "combina-

has refused or 'continues to refuse to transmit' PASNY hydroelectric power for the prospective account of the Town of Massena" (Protest and Petition, Exhibit H, at 38a).

tion to . . . monopolize" and that the revenues from the agreement would be "used to further and strengthen said combination, Massena did not say how the alleged "combination" works* or how much of the proposed revenues from the Con Ed-Niagara transmission agreement would be unnecessary for proper purposes and would be available to fund the unlawful "combination."

Thus, the only fact even *alleged* by Massena in support of any of its charges is Niagara's "refusal" to commit to wheel power when and if the proposed Massena utility should become a reality.

Accordingly, in its Protest and Petition, Massena requested as relief only that the Commission (1) allow Massena to intervene as a party in Docket E-9379, (2) reject or, alternatively, suspend for five months the filing of the Con Ed-Niagara transmission agreement and order a hearing on Massena's allegations, and (3) order an immediate conference of the parties "for the purpose of negotiating an interim settlement to avoid injury" to Con Ed (Protest and Petition, 16a).

Con Ed and Niagara both opposed Massena's Protest and Petition on the grounds that it had no relation to the *rate*, i.e., the Con Ed-Niagara transmission agreement, before the FPC in Docket E-9379 and that Massena had shown no adequate support for its charges.

* In its Protest and Petition, Massena asked the FPC to "order an immediate conference of the parties for the purpose negotiating an interim settlement *to avoid injury to Consolidated Edison.*" (16a; emphasis added.) It must be assumed that Massena did not consider Con Ed to be a member of the alleged "combination."

By order issued June 2, 1975 (54a) the FPC accepted the Con Ed-Niagara transmission agreement for filing as a rate schedule and denied Massena's motion to reject or suspend the operation of said rate schedule. Said order also permitted Massena to intervene in Docket E-9379, however, providing that Massena's participation be limited to matters specifically set forth in the Protest and Petition and that Massena's intervention "not be construed as recognition by the Commission that [Massena] might be aggrieved because of any order or orders of the Commission entered in this proceeding." In making the June 2, 1975 order, the FPC stated:

"Specifically, the proper issue for the Commission's consideration is whether the rate proposed herein is just and reasonable, as well as free from undue preference and discrimination.

* * * * *

"The Commission's review of Niagara Mohawk's filing indicates that the proposed rate schedule is just and reasonable and is indeed free of undue preference and discrimination and shall therefore be accepted for filing and approved.

"Although we find that granting Massena's petition to intervene by Massena may be in the public interest, we find that the Motion for rejection or suspension should be denied. After careful review, we believe the latter does not address the issue presented for consideration under this filing, that is, whether the proposed rate schedule for the Niagara transmission service between Rochester and Con Ed provides for just and reasonable rates consistent with the public interest. Massena's argument is basically that Niagara is acting in an anti-competitive manner because it refused to agree to wheel PASNY power to Massena in the event that Massena establishes a municipal electric

distribution system. Massena argues that it is therefore appropriate to reject or suspend and set for hearing Niagara's rate schedule for service to Consolidated Edison since approval of the instant rate schedule 'will financially strengthen Niagara' in its alleged efforts to 'resist the establishment of a municipal electric system in Massena through advertising, legislative efforts in New York, and in its dealings with PASNY.'

"Our review of Massena's pleadings, and the responses thereto, indicates that a reasonable and sufficient nexus has not been established by Massena between the alleged monopolistic, anticompetitive practices and designs of Niagara and the proposed electric transmission service agreement herein filed with the Commission. Moreover, without demonstrating substantial anticompetitive practices, Massena has failed to indicate what possible harm it will experience as the result of the instant rate schedule filing. As conceded by Massena, the Commission is not authorized to compel Niagara to enter into an agreement to provide electric transmission service to Massena. Massena's desire to establish a municipally owned and operated electric distribution system is unrelated to the immediate issue raised in this filing." (55a, 56a-57a; footnote omitted)

Massena moved for rehearing and/or clarification of the June 2, 1975 order. In its motion, Massena stated (Town of Massena Application for Rehearing And/Or Clarification of Decision and Order of the Federal Power Commission, at 62a):

"The Commission by allowing Massena to intervene while simultaneously accepting the transmission agreement for filing and allowing it to become effective, seems to have allowed intervention into nothing."

Massena incorporated by reference in its motion all of the allegations of the Protest and Petition, but Massena added

nothing to those allegations except to say that Niagara had not denied "that it has refused to agree in principle to wheel PASNY power to Massena upon establishment of a municipal utility" and that Niagara had admitted that, as a matter of course, it enters into transmission agreements with investor-owned and consumer-owned utilities and with governmental agencies. Massena then stated:

"Under these circumstances, Massena must inquire of this Commission whether it feels it lacks the authority to rectify what appears to be discrimination by Niagara Mohawk in execution of transmission agreements, all or most of which are subject to the jurisdiction of this Commission." (61a-62a)

In making such inquiry, Massena made no reference to the earlier statement in its Protest and Petition that "this Commission has no authority" (14a) to order the execution of transmission agreements.

Indeed, in its rehearing clarification motion, Massena went on to state:

"... Massena continues to believe that this Commission has ongoing jurisdiction and a role to play where complaints of discriminatory treatment are lodged against regulated utilities' practices in connection with transmission agreements that are clearly subject to this Commission's jurisdiction under Sections 205 and 206 of the Federal Power Act." (63a)

Massena also suggested:

"... the Commission possibly intends an investigation into Niagara Mohawk's contracting practices with investor owned and consumer owned utilities and with governmental agencies, . . ." (62a)

The FPC in its order issued July 23, 1975 (66a), granted Massena's application for rehearing and, as suggested by Massena, ordered the institution of an investigation pursuant to Section 206 of the Act ("the investigation"). The investigation was ordered in *Docket E-9379*, where, the FPC had stated, the issue was "whether the proposed rate schedule for the Niagara transmission service between Rochester and Con Ed provides for just and reasonable rates consistent with the public interest" (56a). The order instituting the investigation gave no additional or amended statement of the issue(s) before the FPC in Docket E-9379, nor did it set forth any operating standards or boundaries for the investigation or express what, if any, relationship is alleged to exist between the investigation and Docket E-9379. Indeed, the FPC said only:

"In view of the allegation raised by the intervenor Massena herein, that Niagara's rate filing is part of an interstate program to unlawfully monopolize the electric utility industry and discriminate against the establishment by Massena of a municipal energy system, we find it is proper and appropriate in the public interest that the Application for Rehearing should be granted and an investigation pursuant to Section 206 of the Federal Power Act be instituted." (66a)

On August 12, 1975, Niagara moved to dismiss the investigation which the FPC had ordered. In said motion, Niagara recited the undisputed fact that it transmits power from PASNY to every municipality relying on PASNY power and listed the municipalities so served (Motion to Dismiss Investigation Directed Pursuant to Order Issued July 23, 1975 Granting Rehearing, Etc., at 73a-74a). Niagara further argued that the FPC has no jurisdiction under

Section 206 of the Act to investigate Massena's charges and that said charges were unsupported and without merit.

By order issued September 25, 1975 (84a), the FPC denied Niagara's motion to dismiss, but made only the following statement in explanation of its order:

"Our review of the pleadings filed in this docket with regard to the allegations of anticompetitive practices by Niagara indicates we do not have sufficient facts before us in order to formulate a decision. Massena alleges it has been disadvantaged by Niagara's discriminatory treatment. We believe an investigation, pursuant to Section 206 of the Federal Power Act, as previously ordered, is necessary to explore that allegation." (85a)

Accordingly, on October 9, 1975, Niagara moved for rehearing of Niagara's motion to dismiss the investigation. In said motion, Niagara again urged that the FPC was without jurisdiction and should dismiss the investigation because there was no "rate" or "practice . . . affecting such rate," as required by Section 206, involved. Thus, Niagara recommended that Massena, if aggrieved, seek redress in a Federal District Court after the model of *Otter Tail Power Co., supra*. Niagara also averred that it had not "refused" to transmit power for Massena, and Niagara requested modification of the order and dates for filing testimony in the investigation.

In opposition to Niagara's application for rehearing, Massena stated, in part:

"Since Niagara Mohawk's practices are subject to this Commission's jurisdiction along with PASNY's, and since Niagara Mohawk owns and operates the backbone transmission system in the Massena service

area, it becomes apparent that this Commission does have jurisdiction to consider Massena's allegations.

"If Massena prevails and establishes its allegations, the Commission is empowered to enter an appropriate order requiring Niagara Mohawk to deal in a non-discriminatory manner with all entities seeking transmission services under Section 206 and to require delivery of PASNY power to Massena in a manner consistent with license conditions imposed under 16 U.S.C. §836." (100a-101a)

In the context of Massena's charges, such an FPC order to "deal in a non-discriminatory manner with all entities seeking transmission services" would amount to an order that Niagara enter into a transmission agreement with Massena. Thus, Massena had come full circle from its earlier "recognition that this Commission has no authority" to order Niagara to transmit power for Massena (Protest and Petition, 14a-15a) to a position that the FPC *does* have authority to order such transmission. Massena suggested several routes through which it attempted *indirectly* to derive power for the FPC to order a transmission agreement from FPC authority *in other areas*.

By order issued November 13, 1975 (105a), the FPC modified the procedural dates of the investigation, but denied rehearing of Niagara's motion to dismiss the investigation. The FPC stated:

"After careful review, we believe that the allegations raised by Massena warrant an investigation and that the Commission has jurisdiction under Section 206 of the Act to proceed with that investigation. Niagara misinterprets the scope of Section 206 when it asserts an existing rate must be the condition precedent to our entering into an investigation and must be the subject

of that investigation. Section 206(a) makes not only 'any rates, charges, or classification' the proper subject of an investigation, but also 'any rule, regulation, *practice*, or contract affecting such rate, charge, or classification' (emphasis supplied)." (108a-109a)

On December 2, 1975, Niagara filed its Petition for Review in this Court.

B. Course of the Investigation to Date

In its order issued November 13, 1975 (105a), the FPC ordered that Massena serve its testimony and exhibits in the investigation by November 25, 1975. Service of the FPC staff's testimony and exhibits, service of Niagara's testimony and exhibits and a hearing were scheduled for later dates.

Massena has never filed its testimony and exhibits. Instead, it has filed a series of requests to defer the investigation. Thus, on November 21, 1975, Massena requested that the service of its testimony and exhibits be deferred until January 9, 1976 (111a). On December 29, 1975, Massena requested that the service of its testimony and exhibits be further deferred until February 28, 1976 (140a).

On February 4, 1976, pursuant to Section 202(b) of the Act, 16 U.S.C. § 824a(b), Massena filed with the FPC an Application for Order Directing the Establishment of Physical Connection of Facilities (144a). In said application, Massena states:

"As the Commission is aware, there is now pending in Docket No. E-9379 an investigation of Niagara Mohawk's alleged refusal to commit to transmission for Massena and Niagara Mohawk's systemwide transmission practices. Massena contends there that this Com-

mission does have jurisdiction to order Niagara Mohawk to 'wheel', but Massena recognizes that the issue is not free of doubt. While not recognizing a lack of jurisdiction in this Commission, Massena believes that the issue need not be decided in the context of this Application. Massena further believes that a deferral of the investigation in E-9379 is in order inasmuch as events in the next two months may render the matter moot.

"Massena further requests a deferral of proceedings in E-9379 pending resolution of this Application." (149a-150a, 154a)

Apart from Massena's requests for deferral, the only activity in the investigation has been the service of a Notice and Application for Depositions and Application for Issuance of Subpenas for Deposition and Production of Documentary Evidence ("Notice and Application") by Massena on November 25, 1975 (115a).

In support of its Notice and Application, Massena offered only the unexplained and unsupported assertion "that the depositions and documents requested are material and relevant to this case and that it is essential to Massena to have these documents and take these depositions in order to prepare and prove its case in the above-captioned docket" (119a, 122a-123a and 126a).

Massena asked that each of three proposed Niagara witnesses produce "any and all documents that are in his possession or control as related to the matters" upon which Massena proposed to examine him. Massena further stated that:

". . . the requested documents *include but are not limited to* agreements, contracts, memoranda, letters,

studies, reports, inquiries, applications, correspondence and the like" (119a, 122a and 125a; emphasis added).

Massena proposed that it examine *each* of the three Niagara witnesses with regard to the following six subjects:

"a. any and all rates, schedules, correspondence, feasibility studies, applications, negotiations, meetings, agreements, documents, discussions and memoranda which culminated in or resulted from any contractual arrangements for the transmission of electric power and energy between Niagara Mohawk and any investor-owned electric utility system;

"b. any and all rates, schedules, correspondence, feasibility studies, applications, negotiations, meetings, agreements, documents, discussions and memoranda which culminated in or resulted from any contractual agreements for the transmission of electric power and energy between Niagara Mohawk and any municipal or consumer-owned electric utility system or any electric utility cooperative system;

"c. any and all meetings, discussions, feasibility studies, correspondence, documents, reports, agreements and memoranda which culminated in or resulted from Niagara Mohawk's refusal to negotiate or bargain in good faith with Massena for a contract for the transmission of electric power and energy from the Power Authority of the State of New York to Massena;

"d. any and all meetings, discussions, feasibility studies, correspondence, documents, reports, agreements and memoranda which culminated in or resulted from Niagara Mohawk's refusal to negotiate or bargain in good faith with or enter into a contractual relationship with any municipal or consumer-owned

electric utility system or electric cooperative utility system which sought a contractual relationship with Niagara Mohawk for the sale or transmission of electric power or energy;

"e. all expenditures of funds by Niagara Mohawk, including but not limited to, expenditures for advertising and legislative efforts in New York;

"f. the form, nature and extent of advertising and legislative efforts undertaken by Niagara Mohawk." (117a-119a, 121a-122a and 124a-125a)

Massena requested the foregoing information for the period from January 1, 1965 to the present (119a, 122a and 125a).

Accordingly, Massena's requests would have required, *inter alia*, the production of information as to *all Niagara expenditures for more than 10 years.*

By letter dated December 3, 1975, FPC staff counsel called for an informal conference among the lawyers for all of the parties in Docket E-9379 to be held on December 12, 1975 at the FPC offices (135a). Massena requested that the FPC postpone action on its Notice and Application pending the December 12, 1975 conference.

At the December 12, 1975 meeting, counsel for Massena abandoned the requests made in the Notice and Application and stated that Massena would submit new requests for subpoenas and depositions. See ¶7, affidavit of Milton S. Gould, sworn to February 19, 1976, in opposition to the FPC's Motion to Dismiss Petition for Review herein.* No

* Said motion was denied from the bench on February 24, 1976 without prejudice to a renewal thereof upon the argument of the Petition for Review herein.

such new requests have to date been filed by Massena, however.

POINT I

The Subject Orders Should Be Reversed.

A. *There Is No "Rate" or "Practice . . . Affecting Such Rate" Involved Here*

Section 206 of the Act, 16 U.S.C. § 824e, provides, in relevant part:

“(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any *rate*, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, *practice*, or contract *affecting such rate*, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.” (Emphasis added.)

The investigation here was ordered by the FPC in Docket E-9379. The only “rate” or “practice . . . affecting such rate” involved in said docket was the Con Ed-Niagara transmission agreement. The only issue in said docket was, as stated by the FPC in its order of June 2, 1975 (56a), “. . . whether the proposed rate schedule for the Niagara transmission service between Rochester and Con Ed provides for just and reasonable rates consistent with the public interest.”

Thus, as to Massena's Protest and Petition, the FPC found (56a-57a):

"After careful review, we believe [Massena's Protest and Petition] does not address the issue presented for consideration under this filing, that is, whether the proposed rate schedule for the Niagara transmission service between Rochester and Con Ed provides for just and reasonable rates consistent with the public interest. Massena's argument is basically that Niagara is acting in an anti-competitive manner because it refuses to agree to wheel PASNY power to Massena in the event that Massena establishes a municipal electric distribution system. Massena argues that it is therefore appropriate to reject or suspend and set for hearing Niagara's rate schedule for service to Consolidated Edison since approval of the instant rate schedule 'will financially strengthen Niagara' in its alleged efforts to 'resist the establishment of a municipal electric system in Massena through advertising, legislative efforts in New York, and in its dealings with PASNY."

"Our review of Massena's pleadings, and the responses thereto, indicates that a reasonable and sufficient nexus has not been established by Massena between the alleged monopolistic, anticompetitive practices and designs of Niagara and the proposed electric transmission service agreement herein filed with the Commission. Moreover, without demonstrating substantial anticompetitive practices, Massena has failed to indicate what possible harm it will experience as the result of the instant rate schedule filing. As conceded by Massena, the Commission is not authorized to compel Niagara to enter into an agreement to provide electric transmission service to Massena. Massena's desire to establish a municipally owned and operated electric distribution system is

unrelated to the immediate issue raised in this filing."
(Footnote omitted; emphasis added.)

Massena never alleged that the Con Ed-Niagara transmission agreement rate was anything other than just and reasonable. Indeed, the FPC found that "the proposed rate schedule is just and reasonable and is indeed free of undue preference and discrimination and shall therefore be accepted for filing and approved". (68a)

Massena moved for rehearing and/or clarification of the FPC's June 2, 1975 Order, suggesting an investigation into Massena's charges against Niagara (see 62a). The FPC, in its order of July 23, 1975 acceded to Massena's suggestion to the extent of instituting the pending investigation. The FPC, *did not*, however, withdraw or in any respect modify its acceptance for filing as a rate schedule of the Con Ed-Niagara transmission agreement.*

Subsequently, upon Niagara's application for rehearing of Niagara's motion to dismiss the investigation, the FPC stated (107a):

"With respect to Niagara's contention that since no rate has been established, the Commission has no jurisdictional basis to investigate a continuing refusal to deal, Massena declares that Niagara's action has an impact on jurisdictional rates. That is, Niagara creates higher rates for jurisdictional customers when it refuses to fully utilize its transmission lines and, as a consequence, lower revenues. Hence, a practice which affects rates within the meaning of Section

* The Con Ed-Niagara transmission agreement thus went into effect and, having been fully performed by the parties according to its terms, expired on October 31, 1975.

206(a) is established, according to Massena. In addition, the barring of a competitor's entry into the electric utility industry has an impact on rates."

If Niagara had, in fact, been engaged in the practices charged by Massena, then the Con Ed-Niagara transmission agreement rate must have been unreasonably high as a result of such practices, along with Niagara's other rates. That Massena could not even *allege*, much less prove, any unreasonableness or impropriety whatsoever in the Con Ed-Niagara transmission rate, and that the FPC found said rate to be "just and reasonable" and "free of undue preference and discrimination," contradicts any general thesis that Niagara was engaged in improper transmission practices "affecting . . . such rates".

***B. The FPC Has No Jurisdiction Over Utilities' Decisions
to Make Or Not Make Agreements to Wheel Power***

The only factual allegation which Massena has made in support of its charges against Niagara is that Niagara "refused" to commit itself to transmit power from PASNY to the proposed Massena municipal electric utility if and when such utility should come into existence.

In *Otter Tail Power Co. v. U.S., supra*, the Court (per Douglas, J.) stated, 410 U.S. at 373-74, 375-76:

"There is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest. As originally conceived, Part II would have included a 'common carrier' provision

making it 'the duty of every public utility to . . . transmit energy for any person upon reasonable request. . . .' In addition, it would have empowered the Federal Power Commission to order wheeling if it found such action to be 'necessary or desirable in the public interest.' H.R. 5423, 7th Cong., 1st Sess.; S. 1725, 74th Cong., 1st Sess. These provisions were eliminated to preserve 'the voluntary action of the utilities.' S.Rep. No. 621, 74th Cong., 1st Sess., 19.

"It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships.

* * *

"So far as wheeling is concerned, there is no authority granted the Commission under Part II of the Federal Power Act to order it, for the bills originally introduced contained common carrier provisions which were deleted. The Act as passed contained only the interconnection provision set forth in § 202(b). The common carrier provision in the original bill and the power to direct wheeling were left to the 'voluntary coordination of electric facilities.'" (Footnotes omitted.)

The Court in *Otter Tail* was unanimous in agreeing that Congress had not given the FPC jurisdiction over utilities' decisions to make or not make wheeling agreements. Thus, Justice Stewart, in an opinion in which he was joined by Chief Justice Burger and Justice Rehnquist, stated, 410 U.S. at 383-386:

"In considering the bill that became the Federal Power Act of 1935, the Congress had before it the report of the National Power Policy Committee on Public-Utility Holding Companies. That report chiefly concerned patterns of ownership in the power indus-

try and the evils of concentrated ownership by holding companies. The problem that Congress addressed in fashioning a regulatory system reflected a purpose to prevent unnecessary financial concentration while recognizing the 'natural monopoly' aspects, and concomitant efficiencies, of power generation and transmission. The report stated that

'[w]hile the distribution of gas or electricity in any given community is tolerated as a 'natural monopoly' to avoid local duplication of plants, there is no justification for an extension of that idea of local monopoly to embrace the common control, by a few powerful interests, of utility plants scattered over many States and totally unconnected in operation.' S. Rep. No. 621, 74th Cong., 1st Sess., 55 (Emphasis added.)

"The resulting statutory system left room for the development of economies of large scale, single company operations. One of the stated mandates to the Federal Power Commission was for it to assure 'an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources.' 16 U. S. C. § 824a. In the face of natural monopolies at retail and similar economies of scale in the subtransmission of power, Congress was forced to address the very problem raised by this case—use of the lines of one company by another. One obvious solution would have been to impose the obligations of a common carrier upon the power companies owning lines capable of the wholesale transmission of electricity. Such a provision was originally included in the bill. One proposed section provided that:

'It shall be the duty of every public utility to furnish energy to, exchange energy with, and trans-

mit energy for any person upon reasonable request therefor S. 1725, 74th Cong., 1st Sess., § 213.

"Another proposed provision was that:

'Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a public utility to make additions, extensions, repairs, or improvements to or changes in its facilities, to establish physical connection with the facilities of one or more other persons, to permit the use of its facilities by one or more persons, or to utilize the facilities of, sell energy to, purchase energy from, transmit energy for, or exchange energy with, one or more other persons.' *Ibid.*

"Had these provisions been enacted, the Commission would clearly have had the power to order interconnections and wheeling for the purpose of making available to local power companies wholesale power obtained from or through companies with subtransmission systems. The latter companies would equally clearly have had an obligation to provide such services upon request. Yet, after substantial debate, the Congress declined to follow this path. As the Senate report indicates in discussing § 202 as enacted:

'The committee is confident that enlightened self-interest will lead the utilities to cooperate with the commission and with each other in bringing about the economies which can alone be secured through the planned coordination which has long been advocated by the most able and progressive thinkers on this subject.'

'When interconnection cannot be secured by voluntary action, subsection (b) gives the Com-

mission limited authority to compel inter-state utilities to connect their lines and sell or exchange energy. The power may only be invoked upon complaint by a State commission or a utility subject to the act.' S. Rep. No. 621, 74th Cong., 1st Sess., 49.

"This legislative history, especially when viewed in the light of repeated subsequent congressional refusals to impose common carrier obligations in this area, indicates a clear congressional purpose to allow electric utilities to decide for themselves whether to wheel or sell at wholesale as they see fit." (Footnotes omitted.)

Justice Stewart described the "subsequent Congressional refusals to impose common carrier obligations" as to wheeling in footnote 4, as follows:

"See, e. g., S. 350 and H. R. 2101, 88th Cong., 1st Sess., providing that:

'Any certificate issued under the provisions of this subsection authorizing the operation of transmission facilities shall be subject to the condition that any capacity of such facilities not required for the transmission of electric energy in the ordinary scope of such applicant's business shall be made available on a common carrier basis for the transmission of other electric energy.'

This bill was re-introduced as S. 1472 and H. R. 2072 in the 89th Congress, 1st Session, and also failed to pass. See also S. 2140 and H. R. 7791, 89th Cong., 1st Sess.

"These bills were all reintroduced in the 90th Congress, as was H. R. 12322, proposing an Electric Power Reliability Act that would have specifically provided the Commission with authority to order

wheeling. In the 91st Congress, bills to establish an Electric Power Reliability Act were again introduced. Section 3 of that proposed Act included a grant of authority for the FPC to order wheeling, see, *e. g.*, S. 1071, 91st Cong., 1st Sess. Yet another bill, H. R. 12585, 91st Cong., 1st Sess., included a very broad provision establishing open access to transmission networks at reasonable rates.

"The proposed Electric Power Reliability Act was reintroduced in the 92d Congress, 1st Session, as S. 294 and H. R. 605. H. R. 12585 from the 91st Congress was also reintroduced, as H. R. 6972, 92d Cong., 1st Sess. Still another bill would have prevented proposed regional bulk-power supply corporations from contracting with an electric utility unless that utility 'permit[s] . . . the use of its excess transmission capacity for the purpose of wheeling power from facilities of such corporation . . . to load centers of other electric utilities contracting to purchase electric power from such corporation.' S. 2324, H. R. 9970, 92d Cong., 1st Sess., § 103 (e)(1)(B). None of these bills was enacted." (410 U.S., at 386)

Indeed, in the Congressional hearings which preceded the enactment of Title II of the Federal Power Act in 1935, the precise question which is presented in the present case was posed as a hypothetical matter to Mr. DeVane, then the FPC Solicitor and one of the principal draftsmen of Title II. Mr. DeVane testified as follows:

"Mr. Wolverton. Under the provisions of this bill, would it be possible for the Government in any of its electric operations to utilize the transmission lines of private companies?

"Mr. DeVane. No sir; and I want to make that very definite; and if there is any doubt about it, so far

as I am concerned, such amendment might be made as to make it clear.

* * *

"Mr. Wolverton. Let me suggest a possible situation. Your answer will clarify my mind considerably as to the effect of this bill in the particular instance: Assume that a municipality built a plant for the generation and distribution of electric energy; assume that a distant community is serviced by a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State. Could the city which has constructed a plant, but has no transmission lines, utilize the system of transmission lines constructed by the private company?"

"Mr. DeVane. No sir." Hearings on H.R. 5423 before the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 74th Cong., 1st Sess., pp. 514-15 (1935).

The FPC itself has, in *City of Paris, Kentucky v. Kentucky Utilities Co.*, 41 F.P.C. 45 (1969); *Village of Elbow Lake, Minnesota v. Otter Tail Power Company*, 46 F.P.C. 675, affirmed *Otter Tail Power Co. v. FPC*, 429 F.2d 232 (CA 8 1970), cert. den. 401 U.S. 947 (1971); and *Southern California Edison Company*, 50 F.P.C. 836 (1973), repeatedly held that as a matter of law that it has no authority to compel wheeling (Protest and Petition, 14a-15a, quoted *supra*).

Indeed, before the FPC in the present case, Massena has expressly admitted that the FPC has no power to compel wheeling. (14a-15a) Accordingly, Massena has not even asked the FPC to order Niagara to transmit power for Massena.

In any event, the undisputed facts here demonstrate clearly that Niagara has not and could not have "refused" to wheel power for Massena, as Massena has alleged. This is so because the essential conditions necessary to a realistic discussion of a wheeling arrangement do not exist here. Thus, it is not and cannot now be known when such a hypothetical wheeling arrangement would begin, what its term would be, what the needs of Massena for power would be at the hypothetically relevant time, what the capability of the Power Authority of the State of New York or other suppliers of power for wheeling to Massena would be at the hypothetically relevant time, or what the capability of and other demands on Niagara's transmission facilities might be at the hypothetically relevant time. Indeed, Massena is presently only in the preliminary stages of a condemnation proceeding which is itself presumably but one early step in a program pursuant to which Massena may or may not ultimately be able to establish for itself a municipally-owned electric utility system. Accordingly, it would be imprudent and impracticable for Niagara to either "refuse" or "agree" to what at present must necessarily be a purely hypothetical "wheeling agreement" with Massena.

**C. There Should Be No Investigation Because
There Is No Jurisdiction In The FPC Here**

The FPC itself has stated, in *Indiana & Michigan Electric Company*, 49 F.P.C. 1232 (1973), at 1232-33:

"The Commission is required to consider anticompetitive issues in this rate proceeding and such issues should not be dismissed in a summary manner with no opportunity afforded these intervenors to lay the factual predicate for such allegations. Richmond and

Fort Wayne must, of course, go beyond sweeping generalizations of anticompetitive allegations and must carry the burden of proof to support such contentions. Such allegations must also be consistent with this Commission's jurisdictional authority under the Federal Power Act, including an appropriate showing that if such allegations are proven that any such anticompetitive conduct is not outweighed by the overall public interest and that the Commission has the power to remedy such conduct." (Emphasis added; footnote omitted.)

See also *Southern California Edison Co.*, *supra*, and *Florida Power and Light Co.*, 50 F.P.C. 1626 (1973).

In *Southern California Edison Co.*, *supra*, at 836, the FPC commented upon *Indiana & Michigan Electric* ("I & M"):

"The I&M order does not impose unreasonably strict pleading requirements but rather sets forth guidelines to insure that an antitrust issue is presented which is capable of resolution by this Commission in the context of the proceeding at hand. As the Supreme Court in its *Gulf States* Opinion clearly states, its ruling in that case is not to be interpreted as saying the Commission must always hold a hearing on the antitrust issue. The Court also noted, without objection, that the Court of Appeals had observed that the summary disposition of the antitrust argument in a proceeding might be acceptable provided such disposition does not go unexplained. Accordingly, our requirements in I&M are designed to elicit such information as is necessary in order for the Commission to determine whether a hearing is appropriate on the antitrust issue. We therefore do not believe we have burdened the parties with overly technical pleading requirements." (Footnotes omitted.)

In *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973), reh. den. 412 U.S. 944 (1973), the Court citing *Otter Tail Power Co. v. U.S.*, *supra*, stated that the FPC has "the responsibility to consider, *in appropriate circumstances*, the anti-competitive effects of regulated aspects of interstate utility operations . . ." 411 U.S. at 758-59. (Emphasis added.) Of course, as discussed above (Point IB, *supra*), *Otter Tail* expressly states that the making of transmission agreements is *not* one of the "regulated aspects of interstate utility operations" subject to the jurisdiction of the FPC.

Further, in *Gulf States*, the Court went on to explain the term "appropriate circumstances," stating, at 762, 763:

"Our conclusion that, as a general rule, the Commission must consider anticompetitive consequences of a security issue under § 204 does not mean that the Commission must hold a hearing on objections in every case. Neither does it mean that every allegation must be fully investigated regardless of its facial merit . . ."

* * *

"On the basis of the record before us, we cannot say that, upon consideration of the objections raised by the Cities, the Commission would not be justified in rejecting them summarily. But such summary action may not go unexplained in the face of the statutory obligation placed on the Commission under § 204. The decision the Commission thus far has made provides us with an inadequate explanation of its reasons for disposing of the Cities' objections on their merits, if that in fact is what occurred."

In *Gulf States*, the Supreme Court affirmed *City of Lafayette, La. v. SEC*, 454 F. 2d 941 (D.C. Cir. 1971). In *City of Lafayette*, the Circuit Court (per Leventhal, J.) had re-

versed the FPC's summary dismissal of charges of anti-competitive practices on the ground that the agency's reasons were not "clear on the record . . ." 454 F. 2d at 953. The Circuit Court then outlined the agency's duty on remand, stating, at 953, 955:

"[W]e think it appropriate to say expressly that an agency is not required to hold hearings in matters where the ultimate decision will not be enhanced or assisted by the receipt of evidence. And as to interventions raising anticompetitive issues we see no objection in law to a disposition without hearing that is accompanied by an explanation, supported in the record, that the intervenor's contentions are too insubstantial or barren to indicate the existence of substantial anticompetitive issues, or to meet the requirement of a reasonable nexus between the activities challenged and the activities furthered by the application."

* * *

"Where an agency has some regulatory jurisdiction over operations, it must consider whether there is a reasonable nexus between the matters subject to its surveillance and those under attack on anticompetitive grounds. But the general doctrine requiring an agency to take account of antitrust considerations *does not extend* to a case like the one before us where the antitrust problem arises out of operations of the regulated company (past and projected) and the agency, here the SEC, *has not been given any regulatory jurisdiction over operations of the company.*" (Emphasis added; citation omitted.)

Here, as discussed above (Point IA, *supra*), the only issue that has ever been framed for decision is whether or not the rate on the Con Ed-Niagara transmission agreement "provides for just and reasonable rates consistent with the public interest." No relationship has ever been

suggested between the present investigation and the decision of that issue. Indeed, that issue *has been decided*: the rate was accepted for filing by the FPC and the Con Ed-Niagara transmission agreement has been fully performed and has expired. The FPC itself stated (56a) that no "reasonable and sufficient nexus" had been established by Massena between its charges and the rate before the FPC.

Finally, as discussed above (Point IB, *supra*), Niagara's alleged "refusal" to agree to wheel for Massena is not subject to FPC jurisdiction. Thus, as stated in *City of Lafayette, supra*, at 955, "[T]he general doctrine requiring an agency to take account of anti-trust considerations does not extend to a case like the one before us . . ."

Subsequent to the Supreme Court's decision in *Gulf States*, the D.C. Circuit decided *Northern California Power Agency v. FPC*, 514 F.2d 184 (D.C. Cir. 1975), cert. den. — U.S. — (1975). There, on facts strikingly similar to those in the present case, the D.C. Circuit affirmed the FPC's summary dismissal without hearing or investigation of allegations of an anticompetitive "scheme." The facts were that the Pacific Gas & Electric Company ("PG&E") and the Sacramento Municipal Utilities District ("SMUD") had entered into contract for the sale and exchange of power and filed those contracts as rate schedules with the FPC. The Northern California Power Agency ("NCPA") filed a protest and petition to intervene with the FPC. The Court stated, 514 F.2d at 186, 187, 188-89:

"The gravamen of NCPA's complaint was that the PG&E-SMUD contracts were part of a scheme by PG&E to monopolize the generation of electric power in northern and central California. Thus, NCPA requested that the Commission suspend the contracts,

require an answer to its complaint, and hold a hearing on the issues presented.

* * *

"On June 8, 1971, the Commission issued an order which, *inter alia*, accepted PG&E's proposed rate schedules and dismissed NCPA's complaint. The Commission, recognizing that SMUD, a public agency of the State of California, is not subject to the Commission's jurisdiction and further, 'that section 201(b) of the Federal Power Act [16 U.S.C. §824(b)], carefully limits [Commission] authority and that [Commission] jurisdiction does *not* extend to the "facilities" used for the generation of electrical energy,' . . . decided it was without jurisdiction to hear NCPA's complaint.

* * *

"The Commission then found the rate schedules just and reasonable and otherwise lawful under the Act and dismissed NCPA's complaint. NCPA promptly sought rehearing, which the Commission granted for purposes of further consideration on August 3, 1971. Almost two years later, the Commission issued its final order denying NCPA's requested rehearing and stated again that it was simply without jurisdiction to remedy the alleged anticompetitive effects of the contracts. NCPA petitioned for review in this Court.

* * *

"NCPA did not allege rate discrimination or that the proposed rates were unjust or unreasonable. It did not even assert that the proposed rates were somehow a part of PG&E's alleged anticompetitive 'scheme'. NCPA sought only to have the contracts held unlawful unless and until they provided for increased capacity of SMUD's thermal units for NCPA's use. The Commission simply does not possess the authority to order such capacity increases in SMUD's nuclear plants.

"NCPA responds to this analysis by maintaining that it did not ask the Commission to exercise jurisdiction over SMUD but rather, to exercise the jurisdiction it does have over PG&E to hold the contracts unlawful. NCPA then asserts that the 'contracts could be made legal' if the Commission ordered them to be amended to accomplish NCPA's requested relief. . . . The clear import of such a procedure would necessitate the Commission doing indirectly what it cannot do directly. The Commission wisely avoided this procedure. See *Central West Utility Co. v. FPC*, 247 F. 2d 306 (3rd Cir. 1957).

"On the record in this case, we do not think that NCPA met its burden of showing a reasonable nexus between the alleged anticompetitive scheme of PG&E and the activities furthered by the PG&E-SMUD contracts filed as rate schedules. The 'transaction' approved here consisted *only* of the rates that PG&E will be charging SMUD. While the consequences of approving the rate schedules could possibly further the alleged anticompetitive scheme, NCPA neither challenged the rates nor asserted their particular relevance to the alleged scheme. Finally, the Commission's jurisdictional reasons for not further investigating NCPA's charges appear well-founded. We question the wisdom of requiring the Commission to investigate that which it has no authority to remedy. Under these circumstances, we cannot say that the Commission's summary disposition of NCPA's complaint was an abuse of discretion." (Footnote and citations omitted; emphasis in original.)

The Court then continues, in a footnote, 514 F.2d, at 189:

"Without intimating any view of the possible merits, *vel non*, of NCPA's allegations against PG&E, we think it appropriate to suggest that existing antitrust laws may well be the most beneficial means of airing NCPA's grievances. See, e.g. *Otter Tail Power*

Co. v. United States, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed. 2d 359 (1973)."

Indeed agencies not only *may* but *should* summarily dismiss allegations of anticompetitive practices if the allegations are unsupported and/or the alleged practices are not within the agency's jurisdiction. In *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924), the Federal Trade Commission claimed, pursuant to its powers under the Federal Trade Commission Act to investigate and prevent the use of unfair methods of competition in commerce, and pursuant to complaints made to the Federal Trade Commission that respondents were engaged in using such methods, that it had "an unlimited right of access to the respondents' papers with reference to the possible existence of [such] practices . . ." 264 U.S., at 305. The Court, per Justice Holmes, resoundingly rejected the Federal Trade Commission's claim, stating, 264 U.S. at 305-06:

"Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire, . . . and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." (Citations omitted.)

Further, the investigation instituted by the orders which are under review here must be recognized and treated as a sham. It exists only to "explore [Massena's] allegation" (86a). The FPC's role here has been strictly passive, leaving the full initiative for the direction and prosecution of this investigation with Massena. The only conclusion that can be drawn is that but for Massena's unsupported allegations against Niagara, there would be no investigation at all.

In this regard, it must be repeated that Massena has been able to make only *one* specific factual allegation against Niagara, which is that Niagara "refused" to commit itself to some hypothetical future agreement to wheel power for Massena's as-yet-nonexistent municipal utility. This alleged wrong, if any facts can ultimately be shown to support its existence, should, we submit, be redressed in a private antitrust action in a Federal District Court. See, *Otter Tail Power Co. v. U.S., supra*; *Northern California Power Agency v. FPC, supra*. In such an antitrust action, the parties would stand on an equal footing under the Federal Rules of Civil Procedure and the fact would be clear to the public eye that this is really a contest between Massena and Niagara, not between Niagara and the government.*

* The potential for corporate "blackmail" in the abuse by private parties of the class action device has been recognized. See Handler, "The Shift From Substantive to Procedural Innovations in Anti-Trust Suits—The Twenty-Third Annual Antitrust Review," Col.L.Rev. 1 (1971), at 9.

Also, the effects of tarnishing in the public view targets of government investigations, even if the investigation itself should ultimately lead to no further government action, has been noted as to grand jury subpoenas. See, *U.S. v. Dionisio*, 410 U.S. 1 (1973); *U.S. v. Mara*, 410 U.S. 19 (1973), Justice Marshall dissenting, at 43-44.

In sum, the FPC investigation here (a) yields the FPC's investigatory machinery to Massena's private use and purposes in a classic fishing expedition, (b) addresses a subject—the decisions of Niagara to make or not make wheeling agreements—which Congress has expressly and repeatedly excluded from the FPC's jurisdiction, and (c) responds to an alleged wrong—Niagara's "refusal" to wheel for Massena—which the FPC has no authority to remedy. Accordingly, we urge that Niagara's motion before the FPC to dismiss the investigation should have been granted and that the FPC erroneously issued the subject orders denying Niagara's motion.

CONCLUSION

The subject orders should be reversed.

Respectfully submitted,

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United States Court of Appeals For the Second Circuit

75-4263

Niagara Mohawk Power Corporation,
Petitioner

v.

Federal Power Commission,
Respondent

Town of Massena, New York,
Intervenor

Affidavit
of
Service by Mail

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Thomas Reycraft , being duly sworn,
deposes and says:

I am over the age of twenty-one years and reside at
668 Ely Avenue State
County Borough of Westchester, City of New York. On the
Secondday of March , 1975 , at 12:00o'clock PM,

I served 2 copies of the
Brief For Petitioner and 2 copies of Joint Appendix
in the above-entitled action on:
Drexel D. Journey, Esq. and Duncan Brown Weinberg & Palmer
Allan Abbott Tuttle, Esq. 1700 Pennsylvania Avenue, N. W.
Allan M. Garten, Esq. Washington D. C. 20006
Federal Power Commission
Washington, D. C. 20426

the attorney for the

in the said action, by depositing said copies, securely
wrapped, properly addressed, and postage fully prepaid,
in a post office box regularly maintained by the U. S.
Government in the post office at 90 Church Street, in the
Borough of Manhattan, City of New York.

Sworn to before me this
2nd day of March, 1976 }

Michael J. Hoops

MICHAEL J. HOOPS
Notary Public, State of New York
No. 30-4503056
Qualified in Nassau County
Commission Expires March 30, 1977

